

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

VAN WELL NURSERY, INC., a  
Washington Corp., HILLTOP  
FRUIT TREES, LLC,

NO. CV-04-0245-LRS

Plaintiffs,

v.

MONY LIFE INSURANCE COMPANY,  
a New York corporation; A/B  
HOP FARMS, INC., a Washington  
corporation; BENNETT G.  
BRULOTTE and TRACY A  
BRULOTTE, individually and  
their marital community;  
WALLA WALLA PARCEL NO. 31-07-  
23-11-00-02

**ORDER GRANTING MONY LIFE'S  
MOTION FOR RECONSIDERATION**

## Defendants.

MONY LIFE INS. CO., a N.Y.  
CORP.

Third-Party Plaintiff,

NATIONAL LICENSING ASSOC.,  
LLC., a Washington limited  
liability company (f/k/a  
Nursery Licensing  
Association, LLC).

### Third-Party Defendant.

## BACKGROUND

14 On July 9, 2004, plaintiffs filed this action for plant patent and  
15 trademark infringement, as well as false designation of origin,  
16 counterfeiting, unfair competition, and Washington Consumer Protection  
17 Act claims. On September 23, 2004, Mony Life answered the complaint  
18 asserting various defenses, affirmative defenses, counterclaims, and a  
19 third party complaint against National Licensing Association (NLA). On  
20 January 24, 2005, the plaintiff's patent infringement claims asserted  
21 against Mony Life were dismissed by entry of summary judgment. On March  
22 16, 2006, the Court granted a second motion for summary judgment  
23 dismissing all remaining claims asserted against Mony Life and granting  
24 a majority of the relief sought in Mony Life's first three counterclaims.  
25 On March 22, 2006, the Court dismissed Mony Life's third party claims  
26 against NLA and denied Mony Life's motion to compel.

Mony Life's remaining counterclaims include:

1. "Inequitable, improper and impermissible" use of United States patents and trademark. Mony Life's Counterclaim ¶ 4.
2. Unfair business practices pursuant to RCW 19.86.020. Mony Life's Counterclaim ¶ 5.
3. Improper and illegal restraint of trade or commerce pursuant to RCW 19.86.030 and 15 U.S.C. § 1. Mony Life's Counterclaim ¶ 6.

In addition, Mony Life has pleaded the following third party claims against NLA:

10 1. Unfair business practices under the Washington Unfair Business  
11 Practices/Consumer Protection Act. Mony Life's Third Party Claims  
12 ¶¶ 1-5.  
13 2. Improper and illegal restraint of trade or commerce pursuant to RCW  
14 19.86.030 and 15 U.S.C. § 1. Mony Life's Third Party Claims ¶ 6.

## DISCUSSION

Defendant Mony Life seeks an order reinstating its counterclaims against NLA, and compelling the NLA to produce documents, to answer interrogatories, to order the resumption of the 30(b)(6) deposition of the NLA. When a district court considers a motion to compel, it must evaluate such factors as timeliness, good cause, utility, and materiality. *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996).

With these factors in mind, the Court **GRANTS THE MOTION IN PART.**

In denying the motion to compel NLA to produce documents and to answer interrogatories, as stated on the record, the Court considered the troublesome timing of the motion. The scheduling order entered on December 6, 2004 required that all discovery be concluded by November 14,

1 2005. All dispositive motions were due on or before November 21, 2005.  
2 Despite Mony Life's having maintained the same defenses, counterclaims,  
3 and third party claims in two successive litigations (this case and cause  
4 number 02-CV-5077-LRS), for reasons unknown to the Court, the NLA  
5 30(b)(6) deposition began on November 14, 2005. In addition, Mony Life's  
6 first requests for production and first set of interrogatories to the NLA  
7 were served on October 12 and October 13, 2005 respectively, making NLA's  
8 responses due on the discovery cut off. Fed.R.Civ.P. 33(b)(3), 34(b).  
9 The timing of Mony Life's pursuit of discovery left Mony Life,  
10 dissatisfied with the NLA's discovery responses, with no option but to  
11 file its motion to compel after the discovery deadline had expired. In  
12 fact it was filed nearly one month later. Mony Life has offered no  
13 reason to justify its last-minute discovery in this case, only noting  
14 that the federal rules technically permit a party to conduct discovery  
15 in any sequence. *Mony Life's Reply in Support of Motion to Compel*, Ct.  
16 Rec. 111 at 7. In addition, given the broad sweeping nature of its  
17 discovery requests, Mony Life could have and should have anticipated  
18 discovery complications. Finally, there were no motions or requests for  
19 extension of the time for discovery.

20 Accordingly,

21 **IT IS HEREBY ORDERED:**

22 1. Mony Life's Motion for Reconsideration is **GRANTED** to the extent  
23 that it deals with counterclaims against NLA, which Mony originally filed  
24 against NLA in the previously dismissed action, (cause number 02-CV-5077-  
25 LRS). The Court ruled that those counterclaims could be consolidated with  
26 this case through the use of third party pleading procedure.

2. Discovery in this case is **closed** and will not be re-opened. However, Mony Life's Motion to Compel is **GRANTED** with respect to the deposition of Mr. Stratton. Mr. Stratton's deposition may be supplemented. The additional deposition time will take place at a time mutually agreeable to all parties in Seattle, Washington. The deposition time **WILL NOT EXCEED THREE HOURS**, excluding breaks.

3. The issue of attorney's fees remains in this case and will be decided by this Court at a later time.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

**DATED** this 18th day of May, 2006.

*s/Lonny R. Suko*

LONNY R. SUKO  
UNITED STATES DISTRICT JUDGE